PARAMILL SDN BHD & ANOR

v.

DATUK JOSEPH PAIRIN KITINGAN

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO: S-02-480-05]
28 AUGUST 2007

LAND LAW: *Ownership - Land scheme, participants of - Claim for land registered in another - Whether claimant paid for land thereof - Whether registered participant had opted out of land scheme - Whether registered participant held land on trust for claimant*

In this appeal, the facts were that the then Chief Minister of Sabah ('PW1') devised a land scheme to enable the notables and associates of a political party called Parti Berjaya to build their homes in Kota Kinabalu. A 53.7 acre of land was identified and allocated for that purpose. The purchase of the said land was financed by a short term bank loan and secured by a joint undertaking to repay by the selected prospective participants of the scheme. The law firm of Messrs Jayasuria Kah & Co ('the law firm') was appointed to manage the scheme and collect all payments. The appellants claimed that the respondent had opted out of the scheme and that the respondent's share, Lot A7 ('the disputed land') was paid for by one Tan Sri Wee ('TSW'). In other words, the respondent held the disputed land in trust for TSW. TSW sought to get the respondent to execute a memorandum of transfer of the disputed land to his nominee but failed. That led TSW to claim for relief in court which claim was subsequently pursued by the executors of his estate after he died. TSW also purportedly assigned all his rights and interest in the disputed land to the 1st appellant (Paramill) before his death.

Before the learned judge, there were three issues to be determined:

(1) whether the purchase price and the development cost for the disputed land were paid by TSW or by Parti Berjaya for the respondent (the first issue);

(2) if the answer to the first issue was yes, whether TSW's and thereby Paramill's claim for the disputed land contrary to and invalidated by s. 88 of the Land Ordinance Sabah (Sabah Cap 68) (the second issue); and

(3) if the answer to the second issue was no, whether TSW's claim barred by s. 3 and/or s. 26 of the Limitation Ordinance 1952 and thereby Paramill's claim? (third issue).

The learned judge ruled in the respondent's favour. Hence, the appellants' appeal.

The respondent's defence was that the land and development costs were fully paid on his behalf by Parti Berjaya out of a party common financial resource known as Scheme A of which he was entitled. He therefore claimed to be the legal owner of the disputed land with an indefeasible title and not a trustee as alleged.

Held (allowing the appeal)
Per Tengku Baharudin Shah JCA:

(1) The contents of three letters exchanged between the parties established the appellants' case and accordingly answered the first issue in TSW's favour. The letters also did not prove the defence case and dispelled any notion that the respondent's share was paid for by anyone else or through Scheme A. The contents of the three letters not only provided independent evidence but evidence from people responsible for the management of the land scheme that TSW did pay for the respondent's share that was reallocated to him (TSW). (paras 33)

(2) PW1 testified that the respondent did not respond to the law firm's letter requesting payment. Nor did anyone on the respondent's behalf pay the amount to PW2 who was appointed to collect all payments from the participants of the land scheme. The respondent attributed his failure to respond to the said letter and to pay the amount requested to his purported understanding that he entrusted the ABC timber committee to pay. But PW1's evidence was that all the costs must be paid by the participants of the land scheme and that he himself had paid for his own share. PW1 also said that Parti Berjaya and ABC timber scheme

never paid for the disputed land. On the contrary, the respondent as an Assistant Minister then did not come within the ABC timber scheme. (paras 35, 36 & 37)

(3) The respondent's failure to respond to the law firm's letter requesting payment was not consistent with the reaction of a person who genuinely believed that his share in the land scheme would be paid by someone else. On the contrary, it was indeed the likely reaction of one who acknowledged that all participants had to pay for their own share in the land scheme and that he did not pay as he had opted out. (para 43)

(4) PW1's and PW2's testimonies were not challenged by cross-examination. Hence, they must be taken to have been accepted by the respondent, in which event, the findings of the learned judge on point was plainly wrong being contrary to the accepted evidence of independent witnesses as PW1 and PW2 had no interest in the dispute. (para 46)

(5) The correspondence between the parties showed that the respondent did not, at any time, claim ownership of the disputed land. Neither did he pay for his share nor ABC timber scheme pay for him. It was only in 1998 that he claimed to recall having fully paid for the disputed land together with other purchasers and denied holding it in trust for TSW. He was only concerned with his liability for real property gains tax when requested to execute the transfer. The appellants therefore had succeeded to show with ample evidence that the findings of fact by the learned judge was contrary to evidence contained in the contemporaneous documents and the oral evidence of PW1 and PW2. The learned judge gave preference to the unsubstantiated belief and recollections of the respondent who had a purpose of his own to serve instead of the oral testimony of independent witnesses as corroborated by the contemporaneous correspondence. (paras 55 & 56)

(6) The learned judge placed an onerous burden on the appellants to produce documents which they did not have while ignoring PW2's acknowledgement, oral and documentary, that the appellants had paid for the disputed land. On the other hand against his own observation that the defence was nothing more than mere belief and speculation, he found

A the respondent's defence established by his (the judge's) own unfounded inferences and conjectures from obscure sources. (para 59)

(7) The ledger entry in respect of TSW spoke for itself and
B favoured the appellants' version. Anyone looking at the ledger should be able to say with certainty that TSW paid for the disputed land. The learned judge clearly misdirected himself when he drew the inference from the ledger entry that the respondent was credited with having paid for the
C said land on 17 May 1979 on the basis that TSW only made his payment in 1980. There was no evidential basis for the former and the latter was an erroneous assumption. Further, the letter relied on by the learned judge to hold that TSW only paid in 1980 was misconstrued. There was no
D date whatsoever and it was merely stated that the amounts in respect of the disputed land were fully paid. PW4 was not asked from which record he obtained the date of such payment. It could only be his assumption based on the date of the letter. (paras 70, 72 & 73)

E **(8)** The learned judge was wrong to draw an adverse inference against the appellants for not producing the documents to prove payments made for the respective shares of the participants in the land scheme. Adverse inference may be
F drawn only if there was withholding or suppression of evidence by the applicants and not merely on account of failure to obtain evidence. The appellants herein produced all the relevant documents in their possession but they failed to get their hands on the documents with the law firm. Not
G that they did not try – PW2 and PW3 were subpoenaed to give evidence and produce documents relating to the land scheme. (para 75)

(9) Sufficient evidence was adduced to establish on a balance of probability that TSW paid for the disputed land. On the
H other hand, there was not a shred of evidence adduced to show that the respondent or anyone else on his behalf made payment to PW2 for his share in the land scheme or for the disputed land. (paras 76 & 77)

I

(10) It was apparent from his judgment that the learned judge had erroneously viewed the claim as an action to deprive the respondent of his title to the disputed land. That was never the issue before the court. It was implicit that only a paying participant was entitled to the disputed land. If TSW established that he paid for the disputed land then the respondent had no right over it and only held it as trustee for TSW. There was a fundamental error, misdirection and a total lack of judicial appreciation of the evidence on the part of the learned judge. (para 81)

(11) The findings of fact by the learned judge were perverse, contrary to admitted and established evidence and inconsistent with the contents of the contemporaneous correspondence between those concerned with the disputed land before the dispute arose. The inferences drawn from the facts, favourable or otherwise were unjustified. Appellate intervention was necessary to correct the error. It followed that the learned judge's answer to the first issue should be set aside and substituted with one in TSW's or the appellants' favour. (paras 82 & 83)

[Case remitted to High Court to determine second and third issues.]

Bahasa Malaysia *Translation Of Headnotes*

Dalam rayuan ini, faktanya adalah bahawa Ketua Menteri Sabah ketika itu ('PW1') telah memperkenalkan satu skim tanah bagi membolehkan orang-orang penting sebuah parti politik yang dipanggil Parti Berjaya membina rumah-rumah mereka di Kota Kinabalu. Sebidang tanah seluas 53.7 ekar telah dikenalpasti dan diperuntukkan untuk tujuan itu. Pembelian tanah dibiayai oleh pinjaman bank jangka pendek dan dijamin oleh akuan bersama beberapa peserta prospektif skim untuk membayar balik pinjaman. Firma guaman Messrs Jayasuria Kah & Co ('firma guaman') telah dilantik untuk menguruskan skim dan mengutip bayaran-bayaran yang berkenaan. Perayu-perayu mendakwa bahawa responden memilih untuk menarik diri dari skim dan bahawa bahagian responden, iaitu Lot A7 ('tanah dipertikai'), telah dibayar oleh seorang Tan Sri Wee ('TSW'). Responden, dengan kata lain, dikatakan memegang tanah dipertikai untuk amanah TSW. TSW telah meminta responden untuk memeterai memorandum pindahmilik tanah dipertikai kepada nomini beliau, namun gagal. Ini menyebabkan TSW membuat tuntutan untuk mendapatkan relif di

mahkamah dan guaman diteruskan oleh wasi-wasinya selepas kematiannya. TSW juga dikatakan telah menyerahhak semua hak-hak dan kepentingan beliau di dalam tanah dipertikai kepada perayu pertama sebelum kematiannya.

Di hadapan yang arif hakim, terdapat tiga persoalan yang perlu diputuskan:

(1) Sama ada harga belian dan kos pembangunan tanah dipertikai dibayar untuk responden oleh TSW atau oleh Parti Berjaya (isu pertama);

(2) Jika jawapan kepada isu pertama adalah ya, sama ada tuntutan TSW dan berikutnya tuntutan Paramill terhadap tanah dipertikai bertentangan dengan dan dibatal oleh s. 88 Ordinan Tanah Sabah (Sabah Cap 68) (isu kedua); dan

(3) Jika jawapan kepada isu kedua adalah tidak, sama ada tuntutan TSW serta tuntutan Paramill dihalang oleh s. 3 dan/atau s. 26 Ordinan Had Masa 1952 (isu ketiga).

Yang arif hakim memutuskan dengan berpihak kepada responden. Perayu dengan itu merayu. Pembelaan responden adalah bahawa tanah serta kos pembangunan telah dibayar sepenuhnya bagi pihak dirinya oleh Parti Berjaya dari satu tabung kewangan bersama parti yang dikenali sebagai Skim A yang mana ia berhak mendapatkannya. Beliau dengan itu menuntut bahawa beliau adalah pemilik undang-undang tanah dipertikai yang mempunyai hakmilik tak boleh disangkal dan bukannya seorang pemegang amanah seperti yang didakwa.

Diputuskan (membenarkan rayuan)
Oleh Tengku Baharudin Shah JCA:

(1) Kandungan tiga surat yang bertukar tangan di antara pihak-pihak telah membuktikan kes perayu sekaligus menjawab isu pertama dengan memihak kepada TSW. Surat-surat juga tidak membuktikan kes pembelaan dan menolak sebarang anggapan bahawa bahagian responden telah dibayar oleh orang-orang lain ataupun melalui Skim A. Kandungan ketiga-tiga surat bukan sahaja menonjolkan keterangan bebas tetapi juga keterangan dari orang-orang yang bertanggungjawab bagi pengurusan skim tanah bahawa TSW sememangnya telah membayar untuk bahagian responden yang diagihkan semula kepadanya (TSW).

(2) PW1 memberi keterangan bahawa responden tidak menjawab surat firma guaman yang menuntut bayaran. Juga tidak ada sesiapapun bagi pihak responden yang membayar jumlah berkenaan kepada PW2 yang ditugaskan untuk mengutip bayaran dari para peserta skim tanah. Responden menyandarkan kegagalannya untuk menjawab surat dan membayar jumlah yang diminta kepada pemahamannya bahawa beliau telah mengamanahkan kepada jawatankuasa pembalakan ABC untuk membuat pembayaran. Namun begitu, PW1 memberi keterangan bahawa semua kos harus dibayar oleh peserta skim tanah dan bahawa beliau sendiri telah membuat pembayaran tersebut untuk bahagian beliau. PW1 juga menyatakan bahawa Parti Berjaya dan skim pembalakan ABC tidak pernah membayar untuk tanah dipertikai. Sebaliknya, responden, selaku seorang Naib Menteri waktu itu tidak tergolong ke dalam skim pembalakan ABC.

(3) Kegagalan responden menjawab surat firma guaman yang menuntut pembayaran adalah tidak konsisten dengan reaksi seorang yang benar-benar percaya bahawa bahagiannya di dalam skim tanah akan dibayar oleh seseorang yang lain. Ia sebaliknya adalah reaksi munasabah seorang yang menerima hakikat bahawa kesemua peserta perlu membayar untuk bahagian mereka masing-masing di dalam skim tanah dan bahawa beliau tidak membayar kerana beliau memilih untuk tidak menyertainya.

(4) Testimoni PW1 dan PW2 tidak dicabar melalui pemeriksaan balas. Oleh itu, testimoni mereka mesti dianggap sebagai diterima oleh responden. Akibatnya, dapatan-dapatan yang dibuat oleh yang arif hakim atas persoalan ini jelas salah kerana bertentangan dengan keterangan diterima saksi-saksi bebas PW1 dan PW2 yang tidak mempunyai apa-apa kepentingan di dalam pertikaian.

(5) Surat menyurat antara pihak-pihak menunjukkan bahawa responden tidak pernah, pada bila-bila masa pun, menuntut hak pemilikan tanah dipertikai. Begitu juga, beliau ataupun skim pembalakan ABC tidak pernah membayar untuk bahagiannya. Hanyalah pada tahun 1998 responden mendakwa bahawa seingatnya beliau telah membayar sepenuhnya tanah dipertikai bersama-sama dengan pembeli-

pembeli lain dan menyangkal memegangnya untuk amanah TSW. Responden hanya risau tentang liabilitinya bersabit cukai keuntungan harta tanah apabila meminta untuk memeterai pindahmilik. Perayu-perayu dengan itu telah berjaya membuktikan dengan keterangan-keterangan yang lebih dari mencukupi bahawa dapatan-dapatan fakta yang arif hakim adalah bertentangan dengan keterangan yang terkandung di dalam dokumen-dokumen kontemporari serta keterangan lisan PW1 dan PW2. Yang arif hakim telah memberi keutamaan kepada kepercayaan dan ingatan responden yang tidak terbukti yang mempunyai niat dan tujuan-tujuannya yang tersendiri, dan tidak kepada testimoni lisan saksi-saksi bebas yang disokong oleh surat-menyurat kontemporari.

(6) Yang arif hakim telah meletakkan satu beban yang sangat berat ke atas perayu-perayu untuk mengemukakan dokumen-dokumen yang tidak mereka miliki, tetapi mengenepikan pengakuan lisan dan dokumentar PW2 bahawa perayu-perayu telah membayar untuk tanah dipertikai. Di sebalik itu, bertentangan dengan pandangannya bahawa pembelaan adalah tidak lebih dari hanya satu kepercayaan dan spekulasi, beliau mendapati pembelaan responden telah dibuktikan berdasarkan inferens dan tekaan-tekaan tak berasas beliau yang diambil dari sumber-sumber yang kabur.

(7) Butiran-butiran lejer berhubung dengan TSW dengan sendirinya menjelaskan halperkara dan berpihak kepada versi perayu-perayu. Sesiapa pun yang melihat lejer mampu menyatakan dengan tegas bahawa TSW telah membayar untuk tanah dipertikai. Yang arif hakim jelas telah tersalah arah akan dirinya apabila beliau membuat inferens dari butiran lejer bahawa responden adalah diyakini telah membayar untuk tanah tersebut pada 17 Mei 1979 memandangkan bahawa TSW hanya membuat pembayarannya pada tahun 1980. Tidak ada asas bukti mengenai perkara yang terdahulu sementara perkara yang terkemudian pula adalah satu andaian yang jelas salah. Selain itu, surat yang menjadi pergantungan yang arif hakim bagi mendapati TSW hanya membayar pada tahun 1980 telah disalah tafsir. Tidak terdapat apa-apa tarikh sekalipun di situ dan ia hanya menyatakan bahawa jumlah berkaitan tanah dipertikai telah

dibayar sepenuhnya. PW4 tidak ditanya dari rekod manakah beliau memperolehi tarikh pembayaran tersebut. Ia mungkin hanya andaian beliau sahaja berdasarkan kepada tarikh surat tersebut.

(8) Yang arif hakim silap kerana membuat inferens adverse terhadap perayu-perayu kerana gagal mengemukakan dokumen-dokumen untuk membuktikan bayaran-bayaran yang dibuat oleh peserta-peserta untuk bahagian mereka masing-masing di dalam skim tanah. Inferens adverse hanya boleh dibuat jika terdapat penyembunyian atau pemerapan keterangan oleh pemohon-pemohon dan tidak cuma kerana gagal mendapatkan bukti. Perayu-perayu di sini telah mengemukakan semua dokumen-dokumen relevan yang ada dalam milik mereka tetapi gagal memperoleh dokumen-dokumen yang ada di tangan firma guaman. Bukan kerana mereka tidak mencuba – kerana PW2 dan PW3 telah disapina untuk memberi keterangan dan mengemukakan dokumen-dokumen berhubung dengan skim tanah.

(9) Keterangan yang mencukupi telah dikemukakan untuk membuktikan atas imbangan kebarangkalian bahawa TSW telah membayar untuk tanah dipertikai. Sebaliknya, tiada secebis keterangan pun dikemukakan yang menunjukkan bahawa responden atau mana-mana orang lain yang membuat pembayaran kepada PW2 untuk bahagian responden di dalam skim tanah ataupun untuk tanah dipertikai.

(10) Agak menyerlah dari penghakimannya bahawa yang arif hakim telah dengan salahnya menimbang tuntutan sebagai satu tindakan untuk menidakkan hakmilik responden terhadap tanah dipertikai. Itu bukanlah isunya yang berada di hadapan mahkamah. Adalah jelas bahawa hanya peserta yang membayar sahaja yang berhak kepada tanah dipertikai. Jika TSW membuktikan bahawa beliau telah membayar untuk tanah dipertikai, maka responden tidak mempunyai apa-apa hak terhadapnya dan hanya memegangnya sebagai amanah untuk TSW. Terdapat kesilapan besar, serta salah arahan dan ketandusan penghematan kehakiman di pihak yang arif hakim dalam menilai keterangan-keterangan.

(11) Dapatan-dapatan fakta oleh yang arif hakim adalah salah, bertentangan dengan keterangan yang diakui dan dibuktikan dan tidak konsisten dengan kandungan surat-menyurat kontemporari di antara pihak-pihak yang terbabit dengan tanah dipertikai sebelum pertikaian meletus. Inferens yang dibuat dari fakta-fakta, sama ada yang berpihak atau sebaliknya, adalah tidak wajar. Denga itu campur tangan peringkat rayuan adalah perlu bagi memperbetulkan keadaan. Ianya mengikut bahawa jawapan yang arif hakim kepada isu pertama harus diketepikan dan diganti dengan satu jawapan yang berpihak kepada TSW atau perayu-perayu.

[Kes dikembalikan ke Mahkamah Tinggi untuk penentuan isu kedua dan ketiga.]

Case(s) referred to:

Abdol Mulok Awang Damit v. Perdana Industri Holdings Bhd [2003] 3 CLJ 497 CA ***(refd)***

Aik Ming (M) Sdn Bhd v. Chang Ching Chuen [1995] 3 CLJ 639 CA ***(refd)***

Anvest Corp Sdn Bhd v. Wong Siew Choong Sdn Bhd [1998] 2 CLJ 245 CA ***(refd)***

Capital Insurance Bhd v. Cheong Heng Wong Goldsmith (KL) Sdn Bhd [2005] 4 CLJ 1 FC ***(refd)***

China Airlines Ltd v. Maltran Air Corporation [1996] 3 CLJ 163 FC ***(refd)***

David Wong Hon Leong v. Noor Azman Adnan [1995] 4 CLJ 155 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Hong Huat Enterprise v. Golden Vale Gold Range And Country Club [2001] 1 CLJ 181 CA ***(refd)***

Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Kim Guan & Co Sdn Bhd v. Yong Nyee Fan & Sons Sdn Bhd [1983] 1 CLJ 273; [1983] CLJ (Rep) 19 PC ***(refd)***

Mat Shah Mohamed & Anor v. Goo Say Meng & Ors [1983] 2 CLJ 194; [1983] CLJ (Rep) 254 FC ***(refd)***

Munusamy v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***

Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 32(b), 165

Land Ordinance (Cap 68) (Sabah), s. 88

Limitation Ordinance 1952, ss. 3, 26

For the appellants - Colin Lau (Colin Clark with him); M/s Colin Lau & Co's For the respondent - Yunof Marinking; M/s Marinking & Co

[Appeal from High Court, Kota Kinabalu; Suit No: K22-160-1998]

Reported by Usha Thiagarajah

JUDGMENT

Tengku Baharudin Shah JCA:

[1] The appellants, who were the plaintiffs in the court below, sought a declaration that the respondent holds Country Lease 015430136 (the disputed land) as trustee for Tan Sri Wee Boon Ping (Tan Sri Wee) and for an order that the respondent execute a registrable Memorandum of Transfer of the disputed land in Tan Sri Wee's favour for registration (the claim). It was alleged that the respondent, as one of the participants of a land scheme initiated in 1976, did not take up and pay for his share resulting in the same being reallotted to Tan Sri Wee. While Tan Sri Wee had fully paid for the land cost (RM42,929.76) and the development cost (RM228,113.70) of the disputed land the respondent made no payment at all. The plaintiffs' claim was however dismissed by the High Court with costs, the learned trial judge holding that Tan Sri Wee only paid the money in 1980 after the respondent was already credited with having paid for it in May 1979, as such no trust had arisen. Hence the appeal to this court. Written submissions were put in by the respective parties and arguments of counsel were heard in Kota Kinabalu when judgment was reserved on 27 July 2006. After due deliberation we have come to the following decision.

Background

[2] It is common ground that Datuk Mohd Harris Salleh (PW1), the then Chief Minister of Sabah, devised the scheme to enable "the notables and associates" of Parti Berjaya to build their homes in Kota Kinabalu. A 53.70 acre piece of land was identified and bought in November 1976 for RM1,500,000 which purchase price was financed by a short term bank loan secured by a joint undertaking to repay by the selected prospective participants of the scheme. The said land being Country Lease 015376986 (the Master Title) was registered in the joint names of the 40 persons

including PW1, the respondent and Tan Sri Wee with each (except PW1) holding 1/44 undivided share with view to its subdivision and intra-structural development and for individual titles to be subsequently issued to the respective owners upon payment of their proportionate land and development costs to the law firm of Messrs. Jayasuria Kah & Co. (the Law firm) which was appointed to manage the scheme and collect all payments.

[3] It is the appellants' contention that the respondent opted out of the scheme when he refused or neglected to pay the land and the development costs asked for. The respondent's share (later earmarked as Lot A7) was subsequently reallotted to Tan Sri Wee (in addition to Tan Sri Wee's Lot A8) who duly paid all the costs as determined for both Lots A7 and A8.

[4] Lot A7 is the disputed land. It was upon subdivision described as Lot 27 and registered in March 1985 in the respondent's name, he being one of the original co-owners named in the Master Title who was alloted with Lot A7, but the document of title was given by the Law firm to Tan Sri Wee, who actually paid for the land and development costs thereof. Tan Sri Wee subsequently and with assistance from the Law firm sought to get the respondent to execute a Memorandum of Transfer of the disputed land to him/his nominee but failed. He came to court for relief, hence the claim.

[5] The respondent's defence is that the land and the development costs were fully paid for and on his behalf by Parti Berjaya out of a party common financial resource known as Scheme A, B, C of which he was entitled under the A Category. He therefore claims to be the legal owner of the disputed land with an indefeasible good title and not a trustee as alleged.

[6] The respondent also avers that the first appellant's (Paramill) purported claim is invalid by virtue of s. 88 of the Land Ordinance (Sabah Cap 68). Alternatively the appellants' claim is said to be statute barred under s. 3 and/or s. 26 of the Limitation Ordinance 1952.

The Substitution

[7] The claim was first instituted by Tan Sri Wee on 30 June 1998. By order of court dated 29 April 1999 Paramill had itself substituted as the plaintiff to carry on all further proceedings of

the claim, Tan Sri Wee having purportedly assigned all his rights and interest in the disputed land on 6 October 1998, before he died two weeks later.

[8] On the first day of trial, 28 February 2005, the respondent, after almost six years, for the first time took objection to the Paramill substitution on ground that it had no *locus standi* to pursue the claim for illegality of the purported assignment which was alleged to be invalid by virtue of s. 88 of the Land Ordinance, null and void for being champertuous, and contrary to public policy for defeating the interest of the administrators and beneficiaries of the assignor's estate. Though displeased with the preliminary objection being raised at the eleventh hour, the learned judge, in view of the illegality point and in order to expedite the trial, ordered the executors of the estate of Tan Sri Wee to be added as plaintiffs in the claim, being in the alternative to Paramill's, and deferred the issue of illegality to the end of trial which was to proceed as scheduled. There is no cross-appeal by the respondent against this order of the learned judge.

The Issues

[9] On commencement of trial, the court was informed that the parties had filed a statement of agreed facts dated 23 February 2005 (SAF) and had also agreed on the issues to be tried by the court as stated in a statement of agreed issues (SAI) filed the same date. The parties would however be calling witnesses on the first issue while submission would be made on the other issues.

[10] The issues to be determined by the learned judge as stated in the SAI are as follows:

(1) Whether the purchase price and the development cost for the said land were paid by the late Tan Sri Wee or by Parti Berjaya for the Defendant (First Issue)?

(2) If the answer to the First Issue is that Tan Sri paid the purchase price and the development cost, whether the late Tan Sri's and thereby Paramill's Claims, for the said Land are contrary to and thereby invalidated by section 88 of the Land Ordinance (Sabah Cap 68) (Second Issue)?

(3) If the answer to the Second Issue is that the late Tan Sri's and Paramill's claims are not contrary to and thereby not invalidated by section 88 of the Land Ordinance, whether the late Tan Sri Wee's claim is barred by section 3 and/or section 26 of the Limitation Ordinance 1952 and therefore Paramill's claim?

Documentary Evidence

[11] As indicated earlier the parties also agreed to basic facts which they incorporated in SAF. For convenience and expedience, only the following paragraphs are reproduced:

5. Datuk Thomas Jayasuriya (now Tan Sri) ("Tan Sri Thomas") wrote a letter dated 25.10.1977 under the letter head of Messrs. Jayasuria Kah & Co. ("the Solicitors") to the Defendant, requesting him to pay RM42,929.76 for the repayment of the said loan to the Bank, for his share in the scheme.

6. The Defendant as the registered owner of the undivided shares in the said 53.70 acres held under CL 015376986, appointed Tan Sri Thomas and Mr. John Kah, the partners of the Solicitors, to be his attorneys to deal with his registered interest which include to subdivide the said 53.70 acres and to sell and transfer his share and to receive the payment thereof.

8. The Solicitors wrote a letter dated 18.07.1986 to the Defendant (by then the Chief Minister of Sabah) reminding him that sometime ago he had decided not to take up his share in the said 53.70 acres and informing him that as result his share was allocated to Tan Sri Wee who had paid the costs in full. The Defendant was further informed that the said 53.70 acres had been subdivided into several lots and that the subdivided title to the subdivided lot (formerly lot 27 or A7) "the said Land") had been issued in his name as he was the registered co-owner of the parent title. The subdivided title is CL 015430136 as stated above. By that same letter, the Solicitors also informed the Defendant that Tan Sri Wee had sold the said Land to Abjah Mohd. Khajim and requested him to execute the memorandum of transfer of the said Land and the stamp duty form. A letter dated 20.06.1986 from Tan Sri Wee to the Defendant agreeing to indemnify the Defendant against all losses and damages arising from the said transfer was also enclosed. Two follow-up letters of reminder dated 9.09.1986 and 18.10.1986 were sent to the Defendant when he did not respond.

9. Subsequently, the Defendant's solicitors Messrs. Maringking Ho & Co. ("the Defendant's Solicitors") replied on the Defendant's behalf by a letter dated 24.10.1986, expressing their client's concern about the implication of real property gains tax associated with the proposed transfer and therefore the Defendant needed time to consider them seriously. In that regard, they enquired about the purchase price paid by Tan Sri Wee and sought confirmation that the Solicitors would prepare an indemnity agreement between the Defendant and Tan Sri Wee.

10. Between 27.11.1986 to 30.09.1994, a number of correspondences flowed between the Solicitors and the Defendant's Solicitors regarding the transfer of the said Land. However, the Defendant never claimed in any of the correspondence that he had paid any money towards the purchase of the said Land or towards the development cost thereof.

12. The Defendant's Solicitors by their letter dated 9.01.1998 in reply to Messrs. Colin Lau & Co.'s letter dated 16.12.1997 to the Defendant as solicitors for Tan Sri, informed for the first time that the Defendant as far as he could recall, had fully paid the purchase price of the said Land and therefore denied that he held the said Land on trust for Tan Sri Wee. Messrs. Colin Lau & Co, by their letter dated 13.04.1998, on behalf of Tan Sri Wee denied the same.

[12] 2 agreed bundles of documents were also put in evidence and marked as exhibits before the trial court – P1 containing documents admitted as to authenticity and contents and P2 containing documents admitted only as to authenticity.

[13] It is significant that P1 includes the Law firm's letter P1 (1-2) dated 18 July 1986 referred in SAF para. 8 reminding the respondent of his earlier decision to opt out of the scheme and informing him that though the disputed land is registered in his name the same had in fact been allocated to Tan Sri Wee who had paid for the same in full. He was requested to execute the documents of transfer of the same to expedite its proposed disposal by Tan Sri Wee who had signified his agreement to indemnify the respondent for any loss arising therefrom.

[14] Also included in P1 is the Law firm's letter P1 (11) dated 24 March 1987 *inter alia* intimating to the respondent that it was PW2's suggestion that the transfer document be sent to the respondent out of deference to him (the respondent by then had become the Chief Minister of Sabah) when the same could have been executed under the power of attorney earlier given by the respondent – refer SAF para. 6.

[15] There is also the letter P1 (13) from the Law firm dated 19 May 1987 offering the respondent to keep the disputed land provided the respondent reimburse Tan Sri Wee the sum of RM271,043.46 which he had paid therefor.

[16] Other letters in P1 confirm facts stated in SAF paras 9, 10 and 12.

[17] P2 contains documents and letters confirming the facts stated in SAF paras 2-8 and 11-12. Also contained therein is the Law firm's letter P2 dated 25 October 1977 referred in SAF para. 5 requesting the respondent to pay RM42,729.70 being his share in the scheme for repayment of the bank loan.

The Evidence Of Witnesses

[18] 5 witnesses were called by the appellants to prove their case but only 3 were directly involved in the implementation and management of the land scheme. They are independent witnesses called to testify and produce documents relating thereto. PW1 was the initiator of the scheme which was managed by a committee of which PW2 was a member and whose Law firm also handled all the accounts. PW3 is a partner of the Law firm who took over responsibilities from PW2 upon the latter's move to Canada in 1986. Their evidence seem to fully substantiate the appellants' claim and dispute the respondent's contention.

[19] As the sole witness on his own behalf the respondent did not appear to go beyond stating his belief and understanding that his share in the land scheme was paid for by the A B C scheme of Parti Berjaya.

Finding Of The High Court

[20] The learned trial judge in his written judgment purported to analyse all the evidence before him and answered the first issue as follows:

The answer to that question would be that Wee had paid the money in 1980 after the Defendant was already credited with having paid for it on 17 May 1979. Could, then, a trust be said to have arisen where the Defendant was said to hold the land in trust for Wee? The answer depended mostly on whether and when the Defendant had relinquished his right to the land and in this respect, the Plaintiff was not able to say when exactly. The next question which needed answering was when can Wee be regarded as having acquired the right to the land which the Defendant would hold in trust for him? This can only be after the committee had decided to allocate him the land on 30 November 1980 but that was provided the Defendant had not paid for the land and development cost. Since the ledger showed that the amount was paid on 17 May 1979 and for the reasons I have stated, could only have been paid for the credit of the Defendant, this condition of the Defendant not having paid was not fulfilled for the trust to arise. It is for the Plaintiff to prove that and since it failed their case had not been established on the balance of probabilities. It does not matter that the Defendant had failed to prove that the political party, called Berjaya had paid as was supposed to be the Defendant's case rather that someone else paying under the ABC title scheme which the evidence established.

[21] The claim was thus dismissed with costs to the respondent. In view of that decision the learned judge said the other two legal issues did not fall to be considered.

The Appeal

[22] Learned counsel for the appellants invited us to review the learned trial judge's findings of fact and inferences and to intervene. Relying on the Federal Court decision in *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors*. [2004] 4 CLJ 309, he submitted that appellate intervention of the learned judge's finding of fact is permissible when the decision is plainly wrong or arrived at without sufficient judicial appreciation of the evidence before him.

[23] He further submitted that appellate intervention is also permissible where a finding of fact depends upon inference drawn from other facts or such finding is against contemporaneous documents. He cited the cases of *China Airlines Ltd v. Maltran Air Corp Sdn. Bhd (formerly known as Maltran Air Services Corp. Sdn Bhd) and another appeal* [1996] 3 CLJ 163 FC; *Kim Guan & Co.*

Sdn Bhd v. Yong Nyee Fan & Sons Sdn Bhd [1983] 1 CLJ 273; [1983] CLJ (Rep) 19 PC and *Anvest Corp. Sdn Bhd v. Wong Siew Choong Sdn Bhd* [1998] 2 CLJ 245 CA.

[24] We have no problem with the statements of law referred in the cases cited. They come from high authority and bind us and all the courts below. But learned counsel for the respondent reminded us of the guiding principle that appellate courts ought not to disturb the judgement of the court below in the absence of any error. He cited the decision of this court in *Hong Huat Enterprise v. Golden Vale Gold Range And Country Club* [2001] 1 CLJ 181. He further submitted that where the learned judge had correctly addressed the relevant law and had the advantage of seeing and hearing the witnesses which opportunity the appellate court did not enjoy, there was no reason to interfere with the decision of the learned judge – See *Mat Shah bin Mohamed & Anor v. Foo Say Meng & Ors* [1983] 2 CLJ 194; [1983] CLJ (Rep) 254 FC.

[25] We were then referred to *Gan Yoo Chin (P) & Anor (supra)* where the Federal Court held *inter alia* that the central feature of the appellate court's intervention is to review and determine whether or not the trial judge arrived at a wrong decision based on the finding of facts and evidence given at the trial. That is what we intend to do.

[26] All that said, let us now look at the appellants' grievances.

[27] It was submitted on behalf of the appellants that the findings of the learned judge that the appellants failed to establish that Tan Sri Wee had paid for the disputed land and that the respondent had established that some one else had paid for him under the ABC timber scheme is wrong on the gounds that such findings are:

(i) contrary to facts contained in the agreed and admitted documents in bundle P1;

(ii) against the evidence contained in contemporaneous documents flowing between the Law firm and the respondent or his solicitors and between the Law firm and Tan Sri Wee before the dispute arose;

(iii) contrary to oral evidence of PW1 and PW2 both of whom were independent witnesses; and

(iv) against the learned judge's own observation that the matters were speculation being based merely on the respondent's own belief that the ABC timber scheme paid for him.

Let us now look at them one by one.

Agreed And Admitted Document P1

[28] On the first ground, it was contended on the appellants' behalf that the facts contained in the agreed and admitted documents show that Tan Sri Wee paid for the 1/44 undivided share initially allotted to the respondent after the respondent decided not to take up his share.

[29] The relevant documents are letters marked as P1 (1-2), P1 (6-7) and P1 (13) which at the outset of trial were agreed to be admitted as to authenticity and contents. On the authority of the Supreme Court in *Jaafar bin Shaari & Anor v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 it was argued that their contents may be relied upon by either side to establish or to disprove a fact in issue.

[30] P1 (1-2) is the Law firm's letter to the respondent which contents are reproduced below:

Your Ref:
Our Ref: TJ/1970C-DC/MJF 18th July 1986

YAB Datuk Joseph Pairin Kitigan,
Jabatan Ketua Menteri,
Kota Kinabalu.

Dear YAB Datuk,

Bukit Padang Land
(formerly Lot 27 or A7 under
former CL No. 015376986
subdivided title CL No. 015430136

We refer to the above land of which you were registered as one of the co-owners of the parent title CL No. 015376986.

2. You will probably recall that you had sometime ago decided not to take up your share in the said land. As a result, your share was allocated to Tan Sri Wee Boon Ping who has paid up the costs in full.

3. The said land was subsequently subdivided into several lots and the title in respect of the lot allocated to Tan Sri Wee is issued in your name because of the fact that you were registered as a co-owner on the parent title.

4. Tan Sri Wee has now sold the lot to one Puan Abjah Mohd Khajim and by a letter dated 20th June 1986 addressed to us a photocopy of which is enclosed for your perusal, Tan Sri Wee requested us to effect transfer of the said lot to the purchaser. In connection with the transfer, we enclose a letter also dated 20th June 1986 from Tan Sri Wee to you in which he agrees to Indemnify you against all losses and damages arising from the transfer of the said lot to Abjah Mohd Khajim.

5. Accordingly, we forward herewith the following documents for execution by you.

(1) 3 copies of the Memorandum of Transfer; and

(2) 5 copies of the Stamp Duty Form.

We should be most grateful if you would please sign in all the places marked 'x' and then arrange for an advocate to attest your signature. Please return all copies of the documents to us as soon as may be convenient to you. You will note from the Stamp Duty Form that your income tax file reference has to be furnished therein and we would appreciate it if the same could be inserted in the form.

4. We also enclose a photocopy of the land title for your record.

Yours faithfully,

JAYASURIYA KAH & CO.

c.c. Tan Sri Wee Boon Ping

[31] P1 (6-7) is a letter from the law firm to the respondent's Solicitors stating as follows:

Your Ref : MH/KK.35/86 (LM)YEM (mms)

Our Ref : TJ/1970C / DC-JH 27th November 1986

Messrs. Maringking Ho & Co.,
Advocates and Solicitors,
Lot 119, 2nd floor,
Jalan Gaya,
Bangunan Dewan Perniagaan
Bumiputra Sabah,
P.O. Box 11746,
88819 Kota Kinabalu.

Dear Sirs,

Bukit Padang Land
(formerly Lot 27 or A7
underformer CL No. 015376986
subdivided title CL No. 015430136

We thank you for your letter dated 25th October, 1986.

2. We are of the opinion that real property gains tax is not payable in this case because your client acquired the undivided share more than seven years ago. The Memorandum of Transfer by which your client acquired the undivided share was dated the 12th November, 1976 and registered on 15th November, 1976. A photocopy of the Memorandum of Transfer is enclosed for your verification and perusal. We wish to add that our opinion is supported by Certificates of Clearance issued by the Inland Revenue Department for similar transfers in respect of other sub-divided lots. These Certificates are available for your inspection if you so wish.

3. Notwithstanding the opinion expressed above, we also furnish below other details which you may find useful in considering the question of real property gains tax:

(i)	Amount paid by Tan Sri Wee Boon Ping on land development costs	$271,043.46
(ii)	Amount received by Tan Sri Wee Boon Ping from Puan Ajah Bte Mohd Khajim (A photocopy of the receipt is enclosed for reference)	$230,000.00

4. Please be informed that Tan Sri Wee Boon Ping has already furnished a letter of indemnity to your client when the Memorandum of Transfer was forwarded to him for execution. However, if that letter of indemnity is not acceptable to your client, we should be grateful if you could forward to us a draft format so that we can revert to Tan Sri Wee Boon Ping for further instructions.

5. We should be grateful for an early reply.

Yours faithfully,

JAYASURIYA KAH & CO.

c.c. Client

[32] The third letter P1(13) is also from the law firm to the respondent's solicitors. It is also reproduced:

Your Ref : MH/KK.35/86 (LM)YEM (mms)

Our Ref : TJ/1970C (2) – JK/MF 19th May 1987

BY HAND – URGENT

Messrs. Maringking Ho & Co.,
Advocates and Solicitors,
Lot 119, 2nd floor,
Jalan Gaya,
Bangunan Dewan Perniagaan
Bumiputra Sabah,
P.O. Box 11746,
88819 Kota Kinabalu.

Attention : Mr. Yunof Maringking

Dear Sirs,

Bukit Padang Land : C.L. No. 015430136

We refer to your letter dated 28th April, 1987 and our reply dated 5th May 1987.

2. In view of the development over this case, Tan Sri Wee Boon Ping's buyer has decided to forgo the purchase and demanded the refund.

3. It is now apparent that your client intends to keep the lot in question. Tan Sri Wee Boon Ping has no objection to giving up the lot in favour of your client provided that your client reimburse him the sum of M$271,043.46 which he had paid for the lot.

4. Tan Sri Wee's buyer wants the refund before the forthcoming Hari Raya Puasa. She is very insistent on this and has threatened Court action if she does not receive payment by then. We should be grateful if you would ask your client to make the payment before Hari Raya Puasa to enable Tan Sri Wee to make the refund.

Yours faithfully,

JAYASURIYA KAH & CO.

c.c. Tan Sri Wee Boon Ping,
W.D.T. 75,
88997 Kota Kinabalu.

[33] The contents of the three letters state the position of the respondent and the appellants *vis-a-vis* the disputed land which unchallenged should establish the appellants' case and accordingly answer the first issue in Tan Sri Wee's favour. It also disproves the defence case and dispels any notion that the respondent's share was paid for by anyone or through the ABC scheme. The admission of the contents of the three letters not only provide independent evidence but evidence from people responsible for the management of the land scheme that Tan Sri Wee did in fact pay for the respondent's share which was reallocated to him. The admission of these contemporaneous documents as to authenticity and contents must necessarily mean that the facts stated therein were admitted to be true. The finding of the learned judge to the contrary is therefore clearly perverse and show lack of judicial appreciation of admitted and established evidence.

Contemporaneous Documents And Evidence Of Independent Witnesses

[34] Learned counsel for the appellants submitted on the contemporaneous documents and the oral evidence together. He alleged that the said findings of the learned judge are against the evidence contained in the contemporaneous letters flowing between the Law firm and the respondent or his solicitors and also between the Law firm and Tan Sri Wee before the dispute arose, and also against the oral evidence of PW1 and PW2 both of whom are independent witnesses.

[35] The Law firms' letter P2 (13-14) dated 25 October 1977 was first referred to. It was addressed to the respondent requesting him to pay RM42,929.76. PW2 testified that the respondent did not respond to that letter nor did the respondent or anyone on his behalf pay the amount to PW2 who was appointed to collect all payments from the participants of the land scheme.

[36] The respondent attributed his failure to respond to P1 (13-14) and to pay the amount requested to his purported understanding that he entrusted the ABC timber committee to pay. But PW1's evidence was that all the costs must be paid by the participants of the land scheme and that he himself paid for his own share.

[37] PW1 also said that Parti Berjaya and ABC timber scheme never paid for the land and development costs. On the contrary, the respondent as an Assistant Minister at the time was given 2500 – 3000 acres of timber land and did not come within the ABC timber scheme which was meant for 3000 party members according to their gradings.

[38] It was submitted by learned counsel that a person in the respondent's position, as a lawyer and Assistant Minister at the time would not have failed to respond if he really believed that he had entrusted the ABC timber committee to pay for him. He would have responded to the letter and referred PW2 to the ABC timber committee for payment.

[39] It was also submitted that such failure to respond reconciled with the evidence of PW1 and PW2 that the individual participants had to pay for his own share as stated in the said letter. The decisions of this court in *David Wong Hon Leong v. Noor Azman bin Adnan* [1995] 4 CLJ 155, 159 and *Abdol Mulok Awang Damit v. Perdana Industri Holdings Bhd* [2003] 3 CLJ 497, 501-2 were cited.

[40] It was further submitted that the respondent did not cross-examine PW1 and PW2 with regards to participants having to pay for their own share and that Parti Berjaya or ABC timber scheme did not pay for the land and development costs as such he must be taken to have accepted the witnesses' account in their entirety regarding the aforesaid matters. *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212 was relied on as authority for the general rule that failure to cross-examine witnesses on a crucial part of the case amounts to an acceptance of the witnesses's testimony.

[41] It is pertinent to note that the letter P2 (13-14) states that the amount requested for was calculated on a pro-rata basis between 40 registered owners (though the respondent held 1/44 undivided share) and included legal fees and interest as the six-month financing was long overdue and the likelihood of further delay in collecting from the outstation participants. The letter also indicates that the Master Title would be subdivided into 3 or 4 categories of lots of varying sizes to be taken up among the participants separately.

[42] Also apparent from this letter is that the 40 co-owners were only nominees for the final participants of the scheme unless they paid for the costs of their share of the land which amount at that stage would only be an estimation for the individual owner as the price of his share would vary according to the category and size of the holding he would be allotted after the planned subdivision. This position of the co-owners was in fact recognised by the learned counsel for the respondent when he cross-examined PW1 at p. 114 of the appeal record (AR):

> Q – Nobody objected that the 39 participants would be registered as owners in the title deed notwithstanding that **they were only trustees.**
>
> A – The 39 plus myself applied to the bank for the loan, when loan was released, paid the owner, all names entered as owners **whether they paid later on or not.** (emphasis added).

[43] Coming back to the respondents' failure to respond to the letter P2 (13-14) and to pay the amount requested, such negative reactions are certainly not consistent with the reaction of a person who genuinely believed that his share in the land scheme would be paid by someone else, be it Parti Berjaya or the ABC timber scheme committee. On the contrary, it is indeed the likely reaction of one who acknowledged that all participants had to pay his own share in the land scheme and he did not pay as he had opted out. That was the position taken by both PW1 who initiated the scheme and paid for his own share and PW2 being the man responsible for the management of the land scheme and for collecting payments from the participants.

[44] Perusal of the notes of proceedings confirms that PW1 and PW2 were not cross-examined at all on the crucial aspects of the defence case. The respondent did not challenge the testimony of PW1 that participants had to pay for their own shares of the land costs to repay the loan and for the development costs in relation to the scheme, that Parti Berjaya could not and never used the party's fund or from the ABC scheme for payments on behalf of the participants, that PW1 paid for the land and development costs for his own share, and that the respondent as Assistant Minister then was given 2500 to 3000 acres of timber land to assist him to pay for his participation in the land scheme.

[45] PW2 was similarly not cross-examined on the point that each participant of the land scheme must pay for his own share, that the respondent did not pay nor did anyone else pay on his behalf, that he had wanted to opt out, and that Tan Sri Wee fully paid for Lot A7 which was initially allotted to the respondent.

[46] Cross-examination of witnesses is classified as one of the fundamental rules of procedural fairness. In *Aik Ming (M) Sdn Bhd v. Chang Ching Chuen* [1995] 3 CLJ 639 CA it is stated thus:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal cases. It applies with equal force in the trial of civil cases.

As PW1's and PW2's testimonies regarding the above-mentioned matters were not challenged by cross-examination they must be taken to have been accepted by the respondent. In which event the findings of the learned judge on point is plainly wrong being contrary to the accepted evidence of independent witnesses as PW1 and PW2 had no interest in the dispute.

[47] Learned counsel then referred us to the Law firm's letter P2 (15-18) dated 1 December 1980 to Tan Sri Wee which informed the latter that the disputed land Lot A7 and his own Lot A8 had been fully paid; Tan Sri Wee's letter P2 (25)/P3(5) dated 30 December 1985 to PW2 confirming the allocation of Lot A7 and Lot A8 to Tan Sri Wee and that all costs had been fully settled; the Law firm's letter P2 (26-28) forwarding to Tan Sri Wee the land title for the disputed land enclosing also therein a note confirming Tan Sri Wee's payment of a total of RM281,414.46 for Lot A7 and which note also states that development costs were to be borne by the owners and that some owners did not want to keep their share and new owners were found who were willing to pay; and Tan Sri Wee's letter P2 (29) dated 20 June 1986 informing the Law firm that he had sold Lot A7 and instructing them to prepare transfer documents for "my trustee" the respondent's execution. The contents of all these contemporenous correspondence are not only inconsistent with but are totally contrary to the finding of the learned judge.

[48] On 18 July 1986 the Law firm wrote to the respondent the letter P1 (1-2) referred in para 8 of SAF requesting him to execute the Memorandum of Transfer and enclosing therein Tan Sri Wee's letter dated 20 June 1986 agreeing to indemnify the respondent against all losses and damages arising from the said transfer. Two follow-up letters were sent to the respondent when he did not respond. Would the Law firm write such a letter to the respondent (by then CM of Sabah) had Tan Sri Wee not paid for the disputed land?

[49] The respondent's first response came in his solicitor's letter P1(5) dated 24 October 1986 to the Law firm as described in para 9 of SAF. It only requested for time expressing the respondent's concern about the implication of the real property gains tax, enquired about the purchase price paid by Tan Sri Wee and sought for an indemnity agreement to be prepared. There is no mention of the respondent having paid for his share or that ABC timber scheme, Parti Berjaya or anyone else had paid for him.

[50] It was only nearly 12 years after having been reminded by the Law firm of his having given up his share which was allocated to Tan Sri Wee who had paid the costs in full that the respondent for the first time raised any protest. That was by his solicitor's letter P2 (41) dated 9 January 1998 which content is described in para. 12 of SAF.

[51] Learned counsel submitted that the respondent's explanation for the delay in responding being due to his reservation about matters pertaining to accounts and the ABC timber scheme was rejected by the learned judge as being totally unacceptable.

[52] It was also submitted that both oral evidence and contemporaneous documents referred above clearly showed that the respondent did not pay for his share, that he had given up his share, that his share was reallocated to Tan Sri Wee, and that Tan Sri Wee had paid the costs in full.

[53] From his judgment, the learned Judge was initially with the appellants up to the time of the respondent's first response. He viewed the respondent's solicitor's letter P1(5) and the respondent's contention about his having reservation as follows:

> That letter revealed that the Defendant was only concerned whether he would be implicated in the payment of tax arising out of the execution of the transfer documents to transfer the property to the third person whom Wee had sold the property to. It is totally unacceptable that there was reservation in that letter, as the Defendant wanted the court to believe, regarding the matter of the accounts and the ABC timber scheme. The letter together with the Defendant's lack of protest to all previous letters where it was asserted that the land was allotted to Wee already revealed what exactly was in his mind at that time and which was that he had already resigned himself to the fact that the land may not be his.

[54] The learned judge also found the further exchange of letters up to early 1987 to further confirm the resignation of the respondent to his having to transfer the disputed land away. That was the time when the respondent revoked the Power of Attorney he gave to PW2 and PW3. It is therefore apparent that up to that stage the learned judge found the contemporaneous documents to favour the appellants in support of the claim. They provide evidence that the respondent did not pay for his share, that he opted out of the land scheme, his share was allocated to Tan Sri Wee who paid the land and all the development costs and for that reason the title deeds were given to Tan Sri Wee though it was registered in the respondent's name. There is no reason for us to disagree. The puzzling subsequent about turn by the learned judge is therefore untenable and inconsistent with evidence.

[55] The correspondence between the Law firm and the respondent's solicitors between 1987 to 1998 in fact continued to show that the respondent did not at any time claim ownership of the disputed land, that he did not pay for his share nor did ABC timber scheme pay for him and that it was only in 1998 that he claimed to recall having fully paid for the said land together with other purchasers and denied holding it on trust for Tan Sri Wee. He was only concerned with his liability for real property gains tax when requested to execute the transfer.

[56] The appellants have therefore succeeded to show with ample evidence that the findings of fact of the learned judge was contrary to evidence contained in the contemporaneous documents and the oral evidence of PW1 and PW2. In this respect the observation of Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd. v. Tinjar Co.* [1979] 2 MLJ 229, 234 FC should serve as good guidance and bear repetition:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence require that oral evidence be critically tested against the whole of the other evidence and circumstances of the case. Plausibility should never be mistaken for veracity.

In our case, the learned judge seemed to take the contrary view in giving preference to the unsubstantiated belief and recollections of the respondent who had a purpose of his own to serve instead of the oral testimony of independent witnesses as corroborated by the contemporaneous correspondence.

Judge's Observation

[57] Learned counsel for the appellants contended that the findings of the learned judge was against his own observation that matters were left to the respondent's own belief that the ABC timber scheme had paid for him the land and development costs of the disputed land. The respondent's evidence on his defence was nothing more than his mere belief and speculation.

[58] It cannot be disputed that the respondent throughout his testimony refrained from making any positive assertion relating to his defence. He only used phrases such as "as far as I can recall", "supposed to be", "it/that was my understanding", "we were told", "would have been arranged by the committee", "I cannot say exactly", "I was given to understand", "Yes, that is my believe", "I believe I was entitled" and, "I believe all the time".

[59] While such phrases would not establish a probable defence, the learned judge in this case held that it did not matter because the appellants had failed to prove their case whereas the defence was established by evidence. The stand taken by the learned judge is clearly unjustified and perverse. On one hand, he had placed an onerous burden on the appellants to produce documents which they did not have while ignoring PW2's acknowledgement oral and documentary that the appellants had paid for the disputed land, while on the other hand, against his own observation that the defence was nothing more than mere belief and speculation, he found the respondent's defence established by his (the judge's) own unfounded inferences and conjectures from obscure sources.

A **The Ledger**

[60] The main reason given in support of the learned judge's findings aforesaid appears to be the ledger found at pp. 144-145 AR which shows payment by Tan Sri Wee on 17 May 1979 B which is said to be almost 1½ years before Tan Sri Wee was allotted the disputed land and before the determination of the amount of the development costs on 1 December 1980. The learned judge held that the sum was paid on 17 May 1979 but not by Tan Sri Wee because he only paid in 1980 according to C letter P3 (2-4) dated 29 March 1985 from Kim Chuan Seng Holdings Sdn Bhd. The respondent was credited as having paid the said sum on 17 May 1979 when Tan Sri Wee only paid in 1980.

D **[61]** Learned counsel for the appellants contended that the ledger is the cornerstone upon which the learned judge built his reasons to infer and conclude that Tan Sri Wee could not have paid for the disputed land in 1979. This is because the learned judge compared the payment date of Lot A7 (17 May 1979) appearing in the ledger with letter P3 (2-4) which states that Tan Sri Wee E had paid a total sum of RM800,000 in 1980 to defray certain costs which included Lot A7 and concluded that the sum was paid but not by Tan Sri Wee who according to the said letter only paid in 1980. From there the learned judge drew inferences and conjectured that PW1 must have made Tan Sri Wee or his F company to be the contractor of the ABC timber scheme and then Tan Sri Wee or his company paid for all the participants including the respondent in the land scheme.

[62] The ledger was included in the notes of proceedings in the G course of the cross-examination of PW3 when the learned judge directed him to get whatever available documents and records concerning the payment for the various lots before further testimony. PW3 produced a ledger which he said was made by PW2's secretary. The learned judge then scanned a page of the H ledger with his computer which was then reproduced at pp. 144-145 AR.

[63] Learned counsel questioned the admissibility of the ledger on grounds that PW2's secretary was not called to give evidence and I PW3 had no personal knowledge of the enteries allegedly made by PW2's secretary. The case of *Capital Insurance Bhd v. Cheong Heng Wong Goldsmith (Kl) Sdn Bhd.* [2005] 4 CLJ 1 FC was cited as

authority. It was further submitted that this copy of the ledger was not even admitted and marked as an exhibit. The learned judge had therefore misdirected himself in relying on the ledger in his judgment.

[64] Unfortunately there is no reply on the point from the respondent's behalf. The simple reason for that could be because the issue was not argued in open court though raised in the appellants' written submission. But it is an issue that cannot be ignored as that appears to be vital to the learned judge's decision.

[65] With due respect you cannot ignore the power of a judge to question witnesses and to order the production of any document or thing in order to discover or to obtain proper proof of relevant facts – see s. 165 of the Evidence Act 1950 (EA). Neither the parties nor their agents are entitled to make any objection to any such order. Statements in the ledger are also relevant facts under s. 32(b) of the EA, being written statements of relevant facts made by a person (secretary) whose attendance cannot be procured without an amount of delay which under the circumstances of the case appeared to the court unreasonable, they being statements made by such person in the course of business and in particular when they consist of entries or memoranda made by him/her in a book (ledger) kept in the ordinary course of business.

[66] In his judgment (see p. 24 of the AR) the learned judge said "the parties and their counsel in this case had put blinkers on the eyes of the judge and asked the judge to grope about for the truth when most of the facts and therefore the truth were not disclosed to the court".

[67] In all the circumstances aforesaid the entries in the ledger are clearly relevant and admissible evidence. The scanned page of the ledger containing those entries was therefore properly admitted though not marked and the appellants' objection is rejected. *Capital Insurance (supra)* must be distinguished on the facts.

[68] It was alternatively submitted on behalf of the appellants that the ledger supports the appellants' case that Tan Sri Wee paid for Lot A7 because the ledger says so. The name of the respondent does not appear anywhere in the ledger as owner of any lot or undivided share nor is there any evidence of any payment made by the respondent or by anyone for his benefit.

[69] It was further submitted that the inference drawn by the learned judge that Tan Sri Wee could not have paid on 17 May 1979 because Kim Chuan Seng Sdn Bhd's letter dated 29 March 1985 stated that the payment was made "in 1980" was wrong.

[70] The ledger entry in respect of Tan Sri Wee speaks for itself and favours the appellants' version. Tan Sri Wee's name is the last name appearing in the 2nd column of the scanned page. Opposite his name you find the lot numbers 27 and A7 in the 3rd and 4th columns. This is followed by 5th and 6th column described as "Land Costs" and "Developments Costs" respectively. Next is the column for "Total Costs" followed by 2 columns for "Payment received and dates" which date is written as "17 May 1979". In the last column titled "Adjusted Total Payments" the figure is given as 271,043.46 which is the same figure described in the Law firm's letter P1 (6-7) as the amount paid by Tan Sri Wee for land and development costs of the disputed land. Below that entry under the 3rd column are lot numbers 26 and A8 followed by figures under the columns for "Land Costs", "Development Costs" and "Total Costs". In the last 2 columns are written the date "17 May 1979" and the figure 240,423.45 under column "Adjusted Total Payments". Anyone looking at the ledger should be able to say with certainty that Lots A7 and A8 were allotted to Tan Sri Wee who paid for the land and development costs thereof on 17 May 1979.

[71] If you compare the 10 names appearing therein which are serially numbered from No. 12 to No. 21 with the names of the applicants for the bank overdraft in letter P2 (1-3) at pp. 335-336 AR, you can see that the names remain in the same order from No. 22 to 38 with 7 names missing including the respondent's. The logical inference is that the 7 persons were registered owners who like the respondent had opted out or did not pay up. Their shares must have been allocated to other existing or new participants. That should also explain the 3 lots allocated for the person named in No. 19 in the ledger and 2 lots instead of one allocated to Tan Sri Wee. It also accounts for the respondent's name being left out from the ledger instead of appearing against Lot A7.

[72] The learned judge clearly misdirected himself when he drew the inference from the ledger entry that the respondent was credited with having paid for Lot A7 on 17 May 1979 on the basis that Tan Sri Wee only made his payment in 1980. There is no evidential basis for the former and the latter is an erroneous assumption. The respondent's name does not appear at all in the ledger to indicate any such payment made by him or on his behalf to PW2 who managed the scheme and handled all collections. It is also contrary to PW1's evidence that participants must pay for their own share and that he paid for his own shares and that neither Parti Berjaya nor the ABC timber scheme paid for any participant. It is also inconsistent with the fact that the name of the participant whose share in the land scheme was paid by Tan Sri Wee remained in the ledger against the Lot A6 allocated to him.

[73] The letter P3 (2-4) dated 29 March 1985 from Kim Chuan Seng Holdings Sdn Bhd. to the Law firm relied on by the learned judge to hold that Tan Sri Wee only paid in 1980 was obviously misconstrued. PW4, the author of the letter, only took over management of the company from his predecessor in 1983. He said he was briefed about the RM800,000 paid by Tan Sri Wee and was handed the Law firm's letter P2 (15-18) dated 1 December 1980 and what he termed as an account P3 (6). According to him those are the records that he meant when he stated in P3 (2-4) that Tan Sri Wee paid RM800,000 in 1980. But P3(6) contains no date whatsoever and P2 (15-18) merely states that the amounts in respect of Lot A7 and A8 were fully paid. PW4 himself was not even asked from which record he obtained the date of such payment. It can only be his assumption based on the date of the Law firm's letter P2 (15-18). The inference drawn by the learned judge that Tan Sri Wee only paid in 1980 is clearly an error and a misdirection based on faulty appreciation of evidence.

Adverse Inference

[74] In analyzing the evidence adduced the learned Judge drew adverse inference against the appellants for their failure to produce "tons of document" to support their allegations that Tan Sri Wee was allotted the land and paid for them before 1980 as such must live with the inference that if such documents were produced they would not support the claim. It was contended by learned

counsel for the appellants that the documents relating to the land scheme were in the hands of the Law firm, an independent party. Tan Sri Wee was merely a participant in the land scheme and documents given to him by the Law firm would be in his possession but not otherwise and these are before the court. PW2 and PW3 were subpoenaed to testify and produce the documents. In fact the learned judge took upon himself to order PW3 to produce documents and records his firm had and the court was told that some files were lost. In the circumstances it was submitted that the learned judge was wrong to make such adverse inference.

[75] We agree with learned counsel that the learned judge was wrong to draw an adverse inference against the appellants for not producing the documents which the learned judge expected them to have available to prove the payments made for the respective shares of the participants in the land scheme. Adverse inference may be drawn only if there was withholding or suppression of evidence by the applicants and not merely on account of failure to obtain evidence as happened here – see *Munusamy v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221. The appellants produced all the relevant documents in their possession but they failed to get their hands on the documents of the Law firm. Not that they did not try – PW2 and PW3 were subpoened to give evidence and produce documents relating to the land scheme.

Payment For Disputed Land

[76] Sufficient evidence were adduced to establish on a balance of probability that Tan Sri Wee paid for the land and development costs of the disputed land. You have the oral evidence from independent witnesses PW1 and PW2 that every participant in the land scheme had to pay for his share, that the respondent had opted out of the scheme and did not pay nor did anyone else pay on his behalf, that the respondent's share was reallocated to Tan Sri Wee who fully paid for the land and development costs thereof and that Tan Sri Wee had fully paid for the land and development costs of both his Lot A8, the respondent's Lot A7 which was reallocated to him and Lot A6 belonging to another participant before the reallocation was even formalized on 30 November 1980. And you have the contemporaneous correspondence between the Law firm, Tan Sri Wee, the respondent and Kim

Chuan Seng Holdings Sdn Bhd to corroborate and confirm such occurances. To top it all the ledger verifies payment for both Lots A7 and Lot A8 made on the same date 17 May 1979 against Tan Sri Wee's name as the last entry on the page scanned by the learned judge on his computer.

[77] On the other hand, there is not a shred of evidence adduced to show that the respondent or anyone on his behalf had made any payment to PW2 for his share in the land scheme or for the disputed land. There is not even a positive assertion to that effect made by him. Nor did he ever deny having opted out of the land scheme in any of his letters or in open court. The absence of his name in the ledger is evidence that he had ceased to be a participant in the land scheme as such he had no right to any of the subdivided lots for him to relinquish or to be deprived of.

[78] Learned counsel also submitted that the learned judge was wrong to make a finding that Tan Sri Wee could not have paid in 1979 because at that time the development costs had not been ascertained. It was argued that the Law firm's letter P2 (15-18) shows that even in December 1980 all costs were only and still estimated subject to adjustment. It was also pointed out that the payment made on 17 May 1979 appearing in the ledger included development costs as such if it was not possible for Tan Sri Wee to have paid in 1979 for such uncertainty then how could there be a finding by the learned judge that the development costs for Lot A7 and Lot A8 were paid on 17 May 1979.

[79] We are not quarelling with that. Suffice for us to note that there is evidence to show that Tan Sri Wee in fact paid RM800,000 which amount after deducting the costs of his Lot A7 and Lot A8 and another participant's Lot A6 left him with a credit of nearly RM100,000 with PW2. He made his payments in advance thereby leaving PW2 to make the necessary adjustments.

[80] The learned judge used the word "axe" several times in his judgment and implied that it was PW1 who axed the respondent from the land scheme and towards the end of his judgment held that a trust could only be created if and when the respondent relinquished his right to the disputed land. The appellants' counsel contended that there was no evidence that the respondent was deprived of his 1/44 share or Lot A7. Instead the evidence shows

that the respondent himself declined to take up his 1/44 share which share was reallocated to Tan Sri Wee. In fact the respondent himself never claimed that he was deprived, he only denied having declined his share. The contemporaneous correspondence corroborates the fact that he opted out resulting in his share being allocated to Tan Sri Wee and when the Master Title was subdivided the lot reallocated to Tan Sri Wee was issued in the respondent's name.

[81] It is apparent from his judgment that the learned Judge had erroneously viewed the Claim as an action to deprive the respondent of his title to the disputed land. That was never the issue before the court. The First Issue was purposely framed in a way that the answer would determine whether or not the disputed land was held by the respondent in trust for Tan Sri Wee. That is subject of course to the answers to the following Second and Third Issues. It is implicit that only a paying participant is entitled to the disputed land. In other word, if Tan Sri Wee established that he paid the price and development costs for the disputed land then the respondent have no right over it and only holds it as trustee for Tan Sri Wee. There is thus a fundamental error, a misdirection and a total lack of judicial appreciation of the evidence on the part of the learned trial judge.

Conclusion

[82] In all the above circumstances it would be untenable to uphold the decision of the learned trial judge. His findings of fact are perverse, contrary to admitted and established evidence and inconsistent with the contents of the contemporaneous correspondence between those concerned with the disputed land before the dispute arose. The inferences drawn from the facts, favourable or otherwise, have been shown to be unjustified. As an appellate tribunal we are duty bound to intervene and correct the error which we now do.

[83] For the aforesaid reasons the appeal is allowed and the learned judge's answer to the first issue is set aside and substituted with one in Tan Sri Wee's or the appellants' favour. Accordingly, the case is remitted back to the High Court to deal with the second and third issues which have not been decided. The respondents to bear the costs of this appeal and in the court below. Deposit is refunded.